No. 06-219

In the Supreme Court of the United States

CHARLES WILKIE, ET AL., PETITIONERS

v.

HARVEY FRANK ROBBINS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution and statutes: Page

REPLY BRIEF FOR PETITIONERS

The court of appeals' ruling exposes government officials to damages actions under RICO and *Bivens* for engaging in regulatory activity that the court explicitly assumed to be within an employee's lawful duties and without the purpose of personal gain. Pet. App. 18a. Respondent has provided no persuasive reason for this Court to leave that far-reaching ruling unreviewed. Nor has he rebutted petitioners' showing that the court of appeals' decision conflicts in multiple respects with the precedents of this Court and other circuits; improperly transforms presumptively lawful land management activities into unconstitutional state action; and disregards bedrock qualified immunity principles. Rather, respondent's multi-layered attempt to avoid certiorari simply underscores the sweeping nature of the court of appeals' holdings and the cause for concern that the decision will chill responsible regulatory conduct in a broad range of contexts, including management of the tens of millions of acres of intermingled public and private lands within the Tenth Circuit. Accordingly, this Court's review is warranted.

A. The Court of Appeals' RICO Holding Warrants This Court's Review

1. As an initial matter, petitioner argues that the court of appeals' decision, and in particular its RICO holding, does not warrant review at this time because the case is in an interlocutory posture. While petitioner cites to no fewer than five briefs in opposition to certiorari filed by the Solicitor General pointing out that the interlocutory posture of a case may be a ground for denying review, *none* of those cases involved claims of qualified immunity. Appeals from the denial of qualified immunity are by their nature interlocutory, and that has never stopped this Court from granting review in such cases. Indeed, because "[q]ualified immunity is 'an entitlement not to stand trial or face the other burdens of litigation,'" this Court has "repeatedly * * * stressed the importance of resolving immunity

questions at the earliest possible stage in litigation." *Saucier* v. *Katz*, 533 U.S. 194, 200-201 (2001) (citations omitted). Because the immunity would be largely meaningless without the ability to obtain interlocutory review, see *Hartman* v. *Moore*, 126 S. Ct. 1695, 1702 n.5 (2006), the interlocutory posture of this case provides no reason for denying certiorari.

2. Respondent's effort to avoid review of the RICO issue is premised on his assertion that "[t]he extortion in this case arises principally" not from the attempt to obtain a reciprocal easement on respondent's land, but "from the *other* actions petitioners took—actions not authorized by the regulations or any other source of law, such as filing false criminal charges, trespassing on respondent's land, canceling his special use and grazing permits on false pretenses, etc." Br. in Opp. 10. That premise, however, is unfounded for several different reasons.

To begin with, the court of appeals explicitly decided the RICO issue on the premise that petitioners at all times acted *within* the scope of their regulatory authority and held that they nonetheless could be guilty of extortion if they undertook those actions with "extortionate intent," even though it is undisputed that they did not act in furtherance of any personal interest or the interest of a third party other than the government. Pet. App. 18a ("[W]e conclude that if Defendants engaged in lawful actions with an intent to extort a right-of-way from Robbins rather than with an intent to merely carry out their regulatory duties, their conduct is actionable under RICO.").

Accordingly, respondent's statement (Br. in Opp. 8) that "the Tenth Circuit held that petitioners would be subject to liability only if they were *not* acting to 'carry out their regulatory duties' in filing false criminal charges against respondent, trespassing on his property, and engaging in the various other extortionate acts that form the basis of liability in this case" is manifestly incorrect. In fact, the court of appeals expressly held that those actions could constitute extortion and give rise to RICO liability—if the requisite "extortionate intent" were

present—even though it conceded that "the regulatory authority may exist" for each of those actions. Pet. App. 17a-18a. And the upshot is that the court permitted this action to proceed to discovery and a possible trial on the RICO claim.

Respondent's related assertion (Br. in Opp. 6) that the decision below will "have no broader or recurring significance" is mistaken for the same reason. Under the court of appeals' RICO ruling, government officials in a broad range of contexts who have direct regulatory contact with private citizens could be exposed to liability, including treble damages, based solely on the allegation that their otherwise lawful regulatory actions were undertaken with an "improper" motive to obtain property for the public interest. That threat is particularly strong where, as here, government officials are dealing with citizens who routinely resort to "intransigence" as a tactic for dealing with the government. *Frank Robbins*, 146 I.B.L.A. 213, 219 (1998); see Pet. 5-6.

Furthermore, respondent's effort to recharacterize the fundamental RICO question presented by this case ignores the fact that the regulatory actions at issue were undertaken only to benefit the government and not to benefit either petitioners or any third person. The RICO cases cited by respondent (Br. in Opp. 13-14) involve the classic situation of the misuse of public office for private gain (*i.e.*, graft). Respondent cites no case holding government officials guilty of extortion when they seek neither a personal gain nor a benefit for a third party other than the government. For the reasons explained in the petition (Pet. 13-16), no such case exists.[1]

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[1] Contrary to respondent's assertion (Br. in Opp. 15), petitioners do not contend that there is a special, nontextual exception for government employees under the Hobbs Act. Rather, petitioners argue that a government employee can only wrongfully "obtain" the property of another with the required *quid pro quo* if he seeks the property for his own benefit or the benefit of a third party other than the government. The government does not commit the offense of extortion merely because it obtains property in excess of its regulatory authority to do so. The same is true of government

The regulatory actions respondent alleges do not support his claim of extortion for additional reasons. He alleges that government employees trespassed on his land, but trespass is not in its nature extortionate. His complaint that petitioners caused false criminal charges to be filed against him was resolved against him by the district court. See Pet. App. 62a-67a. And it is too late for respondent to allege in this RICO action that the government improperly cancelled his easement and special use and grazing permits. If, as respondents allege, those actions were taken without authority or for improper purposes, he could have enjoined them through traditional administrative and judicial avenues when the actions were taken. But having passed on his opportunity to challenge those actions through appropriate and timely administrative and judicial means, he cannot now use them as the basis for his RICO and *Bivens* action by alleging that they were undertaken with an improper motive.

3. Respondent's attempt to distinguish the Eighth Circuit's decision in *Sinclair* v. *Hawke*, 314 F. 3d 934 (2003), is unavailing. Respondent asserts (Br. in Opp. 8) that the *Sinclair* court rejected the RICO claim in that case because the plaintiffs claimed only discrimination and did not even attempt to establish extortion or any of the other predicate acts enumerated in RICO. See 18 U.S.C. 1961(1). But that is not the ground on which the Eighth Circuit based its holding. Rather, the court held that the plaintiff could not state a RICO cause of action because the government employees in that case had "take[n] regulatory action consistent with their statutory powers," and to the extent those employees had overstepped proper regulatory bounds, they could not be held personally liable under RICO for their actions. *Sinclair*, 314 F.3d at 943. In short, the court held, "bank

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employees acting only in the public interest. Aggressive regulatory action may be challenged or enjoined through established administrative and judicial procedures, but regulators who take such actions are not extortionists in any sense of that term as used by either the Hobbs Act or state criminal laws.

regulators do not become racketeers by acting like aggressive regulators." *Id.* at 944. Even respondent agrees that the Eighth Circuit's RICO holding in *Sinclair* was "correct" (Br. in Opp. 8), yet he defends the contrary conclusion reached by the Tenth Circuit below.

The court of appeals below recognized that *Sinclair* was otherwise relevant and distinguished it only on the narrow ground that it involved no disputed issue of fact as to the regulators' improper motive. Pet. App. 21a ("In this case, however, there is a factual dispute, not present in *Sinclair*, regarding whether Defendants were merely enforcing the law or using their otherwise lawful authority to extort a right-of-way from [respondent]."). But that factual distinction is also misguided, both because *Sinclair* expressly did involve allegations that otherwise permissible regulatory acts were undertaken with unlawful motives, see 314 F. 3d at 939 ("The issue, broadly stated, is whether Congress has authorized wide-ranging judicial review of *regulators' motives* in personal damage actions that might have a chilling effect on their willingness to aggressively attack unsafe and unsound banking practices.") (emphasis added), and because the alleged improper motive in this case—seeking to obtain a reciprocal easement on respondent's land for the public interest—was itself a legitimate regulatory objective. It makes no sense to speak of an extortionate intent when, as here, the only property public officials are alleged to have (improperly) sought was for the benefit of the public. See Pet. 14-16.

B. The Court Of Appeals' *Bivens* Holdings Warrant This Court's Review

As explained in the petition (Pet. 16-26), the court of appeals' decision permitting respondent's extraordinary *Bivens* claim to proceed independently merits this Court's review. Respondent's attempt to avoid such review is unpersuasive.

1. Respondent's brief jurisdictional objection is without merit. This Court in *Hartman* v. *Moore*, 126 S. Ct. at 1702 n.5, made

clear that the question whether a plaintiff has stated a cause of action under *Bivens* is "directly implicated by the defense of qualified immunity" and was therefore "properly before [the Court] on [the] interlocutory appeal" concerning qualified immunity. While the issue in *Hartman* concerned whether the party had properly satisfied the *elements* of the constitutional torts alleged in that case, there is no reason to reach a different conclusion where, as here, the question is the even more fundamental one of whether *Bivens* provides a cause of action *vel non*. In both cases, the question is purely legal, relates to what the plaintiff "must plead and prove in order to win," *Ibid.*, and is inextricably intertwined with the question of immunity. Indeed, properly understood, the question in both cases is the same: whether the plaintiff can state a cause of action under *Bivens*. Here, respondent plainly cannot, because—as other courts have recognized in analogous circumstances—the APA establishes a comprehensive remedial mechanism governing challenges to administrative actions such as those at issue in this case. See Pet. 17-21.[2]

2. The court of appeals rejected the APA preclusion argument to the extent that any of respondent's allegations of retaliation did not "involve individual action leading to final agency decisions reviewable pursuant to the APA." Pet. App. 82a. That holding is inconsistent with the court of appeals decisions cited in the petition (Pet. 18-19), which make clear that the APA constitutes a comprehensive statutory review mechanism that precludes a *Bivens* action, even where the APA does not provide a remedy for certain allegations. While those

[2] Respondent's argument (Br. in Opp. 18-19) that the court of appeals lacked jurisdiction over the APA preclusion claim because it had been addressed in the prior interlocutory appeal in this case is equally misguided. Indeed, in *Behrens* v. *Pelletier*, 516 U.S. 299, 309 (1996), this Court specifically indicated that resolution of qualified immunity issues may "require more than one judiciously timed appeal." The court of appeals properly concluded that more than one such appeal was permitted here. See Pet. App. 6a-9a.

cases do not involve the specific context of federal land management, they do reject the reasoning of the court of appeals below that the APA precludes a *Bivens* action only to the extent it provides a remedy for each allegation of regulatory misconduct. See, *e.g.*, *Sinclair*, 314 F.3d at 940; *Nebraska Beef, Ltd*. v. *Greening*, 398 F.3d 1080, 1084 (8th Cir. 2005), cert. denied, 126 S. Ct. 1908 (2006); *Miller* v. *United States Dep't of Agriculture*, 143 F.3d 1413, 1416 (11th Cir. 1998).

Moreover, contrary to respondent's assertion, his allegations of retaliation are not "unrelated to any final agency action." Respondent himself, in challenging the Bureau of Land Management's (BLM's) determination that respondent had trespassed on public lands, argued that the litany of BLM actions against him were part of an effort to "blackmail" him into providing a reciprocal easement to the government. See *Frank Robbins*, 146 I.B.L.A. at 218. The Interior Board of Land Appeals (IBLA) rejected that argument, finding that "[t]he record effectively shows * * * intransigence was the tactic of [respondent], not BLM." *Id.* at 219. Respondent did not seek judicial review of that decision, just as he did not seek judicial review of his challenges to the BLM's decisions to cancel his right-of-way on public lands and his grazing and special use permits and to fine him for trespass—the very regulatory acts he now claims resulted in the "complete destruction of [his] business." Br. in Opp. 2; see Pet. 5-7. Respondent cannot simultaneously contend that all of petitioners' actions were in furtherance of a plan to extort a reciprocal easement and that certain of those acts (those not leading to final agency action) are unrelated to the actions (the cancelling of his right-of-way and permits) that he claims primarily caused his injuries.

Respondent also fundamentally misstates petitioners' position regarding APA preclusion. Petitioners do not contend that "individuals have no remedy at all for even the most egregious violations of their most basic constitutional rights whenever the defendants are employed by a federal agency subject to the

APA." Br. in Opp. 22. Rather, petitioners' position is that where, as here, Congress has provided a comprehensive regime for administrative and judicial review, including review of constitutional claims under 5 U.S.C. 706(2)(B), that regime, and not *Bivens*, is the appropriate mechanism for raising constitutional and other claims.

3. Respondent's attempt to defend the court of appeals' unprecedented Fifth Amendment ruling is unavailing. See Br. in Opp. 24-26. Relying, *inter alia*, on this Court's decisions in *Nollan* v. *California Coastal Commission*, 483 U.S. 825, 837 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374, 387 (1994), respondent asserts that "[t]he Constitution forbade petitioners from conditioning respondent's right to other government benefits (*e.g.*, grazing permits, road maintenance, etc.) on his waiver of his Fifth Amendment rights," because "[t]he denial of those benefits had no relationship to the BLM's legitimate regulatory interests relating to grazing, road maintenance, etc., and was nothing more than an 'out-and-out plan of extortion.'" Br. in Opp. 26-27 (citation omitted). But there are several problems with respondent's reliance on those decisions.

First, as found in respondent's administrative challenges to each of the complained-of actions, petitioners had good and sufficient regulatory reasons for each of the actions taken and did not base their decisions on a desire to obtain an easement on respondent's land. Respondent—like the land owners in *Nollan* and its progeny—could have sought judicial review of those adverse administrative adjudications and, if he could establish the improper motivation he now alleges, could have prevented those actions from occurring. He did not do so. He therefore should not now be able to avoid dismissal on the ground of qualified immunity by merely alleging in this extraordinary *Bivens* action the same improper motives that he failed to establish in the customary administrative and judicial proceedings available to him at the time.

Second, in the *Nollan* line of cases upon which respondent relies, there was an actual interference with property owned by *the private citizen*. In *Nollan* itself, for example, the property owners were denied a building permit on their land unless they agreed to a public easement. Here, in contrast, respondent alleges—at most—that petitioners placed an improper condition on an asserted right to use *public* lands. At bottom, respondent alleges that he is being denied the use of *public* lands—namely, maintenance of the federal portion of Owl Creek Road and grazing privileges on federal lands—because he will not consent to a reciprocal right-of-way over his portion of the road. While a property owner is free to argue that conditions on the use of public lands violate his due process or equal protection rights, there is no support for the rule adopted by the court of appeals in this case that alleged conditions on the use of public land may constitute a *taking* under the Fifth Amendment.

Respondent cannot avoid the disconnect between the conditions he is challenging on his use of public land and the Takings Clause simply by pointing to the "right to exclude." To be sure, the Fifth Amendment Takings Clause encompasses a right to exclude others, including the government, from one's property. See Pet. 21. But that right does not support a *Bivens* action where, as here, the landowner pointedly has not alleged, much less shown, any taking as the basis for his Fifth Amendment claim. And it certainly provides no basis for a *Bivens* action where the landowner ultimately is asserting government interference with his enjoyment of public lands.

Third, as explained in the petition (Pet. 25-26), no court has recognized an anti-retaliation right outside the First Amendment context, and there is no reason to extend such a right to the fundamentally different context of the Fifth Amendment Takings Clause. Among other things, the relatively common situation of interlocking federal and private lands necessarily requires back and forth between the government and private landowners. In addition, even beyond that situation, the takings context

necessarily envisions a degree of permissible government interference with property rights, albeit with just compensation, wholly alien to the First Amendment.

C. The Court of Appeals' Qualified Immunity Holding Warrants This Court's Review

The court of appeals holding that the Fifth Amendment and statutory rights it relied upon were *clearly established* is indefensible. No previous decision of any court suggests that petitioners' conduct in attempting to obtain a reciprocal right-of-way from respondent through the exercise of their lawful regulatory authority (as expressly assumed by the court of appeals) would violate any statutory or constitutional right. Indeed, no court had even expanded the right against retaliation to the Fifth Amendment context. Respondent does not suggest that any such case law exists. Instead, he asserts that the question whether any right was clearly established at the time of the conduct in this case is a "fact-bound" question that does not warrant this Court's review. But the question whether conduct violated a clearly established right is the *legal* question at the core of the qualified immunity analysis. *Saucier*, 533 U.S. at 201-202; *Wilson* v. *Layne*, 526 U.S. 603, 615 (1999). Given the importance of the questions presented to federal land management and a variety of other regulatory contexts—and the potential of the decision below to cause substantial disruption in those areas—this Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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